06-99001/06-70206

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLARENCE RAY ALLEN, Petitioner-Appellant, **v.** **STEVEN ORNOSKI, Warden,** Respondent-Appellee.	**CAPITAL CASE** **EXECUTION IMMINENT - JANUARY 17, 2006**

On Appeal from the United States District Court
for the Eastern District of California
No. S-06-64 FCD
The Honorable Frank C. Damrell. Jr., Judge

RESPONDENT'S SUPPLEMENTAL FILING IN OPPOSITION TO PETITIONER'S ARGUMENT IV OF HIS REQUEST FOR A CERTIFICATE OF APPEALABILITY

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

MARY JO GRAVES
Senior Assistant Attorney General

JANIS SHANK MCLEAN
Supervising Deputy Attorney General

WARD A. CAMPBELL
Supervising Deputy Attorney General
State Bar No. 88555

1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5251
Fax: (916) 324-2960

Attorneys for Respondent-Appellee

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Allen raises four arguments in support of his request for a certificate of appealability (COA). Arguments I through III were addressed in Respondent's original filing in opposition to the request for a COA, and Argument IV is addressed in this supplemental filing. Respondent asserts that the Argument IV is waived, and, in any case, Allen is not entitled to a COA.

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a petitioner is required to obtain a certificate of appealability in order to appeal a denial of a habeas petition. 28 U.S.C. §§ 2253(b) and (c)(1). Subdivision (c)(2) provides that a COA "may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." A petitioner makes a substantial

showing of the denial of a constitutional right when he shows that jurists of reason could find the assessment of his claim debatable if not wrong, or that jurists could conclude that the issue is adequate to deserve encouragement to proceed further. *See Banks v. Dretke*, 540 U.S. 668, 704-05 (2004); *Slack v. McDaniel*, 529 U.S. 473, 482 (2000); *see also Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

Allen asserts that the denial of his Eighth Amendment claim is a debatable outcome based, in part, on the application of an unconstitutional standard of review by the district court. The district court applied AEDPA's deferential standard of review, 28 U.S.C. § 2254(d). Allen does not dispute the application of AEDPA to his case or the district court's authority to decide it; rather, he claims that the standard of review contained in AEDPA constitutes a violation of separation of powers and the Supremacy Clause. (Petn. at 25.) Instead of giving deference to the state court's denial of his Eighth Amendment claim, Allen asserts the district court should have engaged in *de novo* review. *Id.*

Allen's attack on AEDPA's standard of review cannot be raised for the first time on appeal, and is waived. In his district court filing, Allen demonstrated a familiarity with AEDPA, discussed the merits of his claim, and even invoked the wording of the deference standard.[1/] However, he never voiced any concern about

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1. See page 24 of the petition for habeas corpus filed in the district court in which Allen states: "The California Supreme Court's decision to deny Mr.

the constitutionality of the standard of review likely to applied to his claim. As a result of his silence, the district court decided the merits of the claim without any knowledge of Allen's unexpressed concerns.[2/] In addition to blind-siding the court, Allen deprived respondent of an opportunity to resolve the issue. As this Court stated in *Handa v. Clark*, 401 F.3d 1129, 1132 (9th Cir. 2005). "[A] party cannot treat the district court as a mere ill-placed bunker to be circumvented on his way to this court where he will actually engage his opponents." *Id.*

It is this Court's general rule to refuse to consider claims raised for the first time on appeal. Similarly, Allen's belated basis for claiming the district court erred in ruling on his claim should be rejected. *See Hormel v. Helvering*, 312 U.S. 552, 556 (1941); *Broad v. Sealaska Corp.,* 85 F.3d 422, 430 (9th Cir.1996) (applying rule to constitutional challenge to statute) (citing *Singleton v. Wulff,* 428 U.S. 106, 120 (1976), and *Golden Gate Hotel Ass'n v. City and County of San Francisco,* 18 F.3d 1482, 1487 (9th Cir.1994)); *United States v. Reyes-Alvarado*,

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Allen's state petition raising this same issue . . . was *contrary to and/or unreasonably applied clearly established Federal law as determined by the U.S. Supreme Court.*" (Emphasis added.)

2. Allen acknowledges in footnote 9 of his request for a COA that he did not raise his constitutionality argument in district court. The assertion that he was foreclosed from making this argument is puzzling given his obvious familiarity with the statute and the near-certainty that AEDPA's standard of review would be applied to his claim.

963 F.2d 1184, 1189 (9th Cir. 1992). This is not an instance in which this Court should exercise its narrow discretion to consider a newly-raised claim. *Kimes v. Stone*, 84 F.3d 1121, 1126 (9th Cir. 1996); *Aronson v. Resolution Trust Corp.*, 38 F.3d 1110, 1114 (9th Cir. 1994); *Bolker v. Commissioner,* 760 F.2d 1039, 1042 (9th Cir. 1985).

Even if this Court did consider Allen's belatedly-asserted basis for his request for a COA, the issuance of a certificate would not be justified. First, the constitutionality of 28 U.S.C. § 2254(d)(1) has already been settled in this circuit and elsewhere. *E.g., Duhaime v. Ducharme*, 200 F.3d 597, 600-01& n.5 (9th Cir. 1999); *Lindh v. Murphy*, 96 F.3d 856, 871-74 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997); *see generally Williams v. Taylor*, 529 U.S. 362 (2000); *see also Triestman v. United States*, 124 F.3d 361, 378 n.21 (2d Cir. 1997); *United States v. Barrett*, 178 F.3d 34, 54 (1st Cir. 1999); *Green v. French*, 143 F.3d 865, 874-75 (4th Cir. 1998), *abrogated on other grounds in Williams v. Taylor*, 529 U.S. 362.

Secondly, the only relevant issue is whether Allen has made a substantial showing of an Eighth Amendment violation. Under either a deferential or *de novo* standard of review, Allen's claim fails for the reasons detailed in the original opposition filed by respondent. Jurists of reason would not find the district court's

denial of the claim debatable, and the issuance of a COA is not justified.

CONCLUSION

For the foregoing reasons, as well as those already set forth in the pleadings on file, the application for certificate of appealability should be denied.

Dated: January 13, 2006

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

MARY JO GRAVES
Senior Assistant Attorney General

JANIS SHANK MCLEAN
Supervising Deputy Attorney General

WARD A. CAMPBELL
Supervising Deputy Attorney General

Attorneys for Respondent-Appellee